BRIEF ON BEHALF OF DEFENDANT IN ERROR

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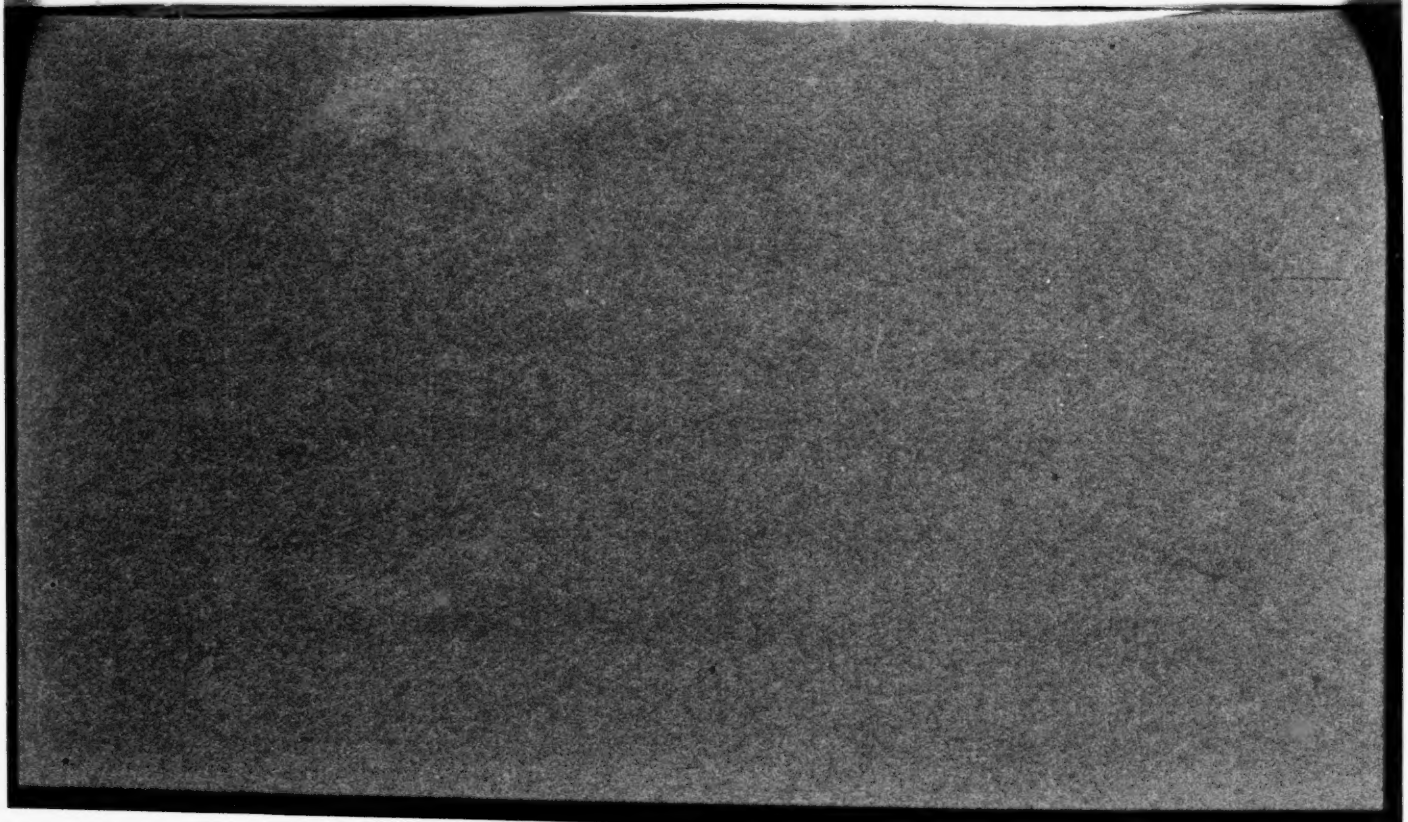

IN THE

SUPREME COURT OF THE UNITED STATES,

OCTOBER TERM, A. D. 1899.

No. 114.

ILLINOIS CENTRAL RAILROAD COMPANY,
Plaintiff in Error,

vs.

THE CITY OF CHICAGO,
Defendant in Error.

ERROR TO THE SUPREME COURT OF ILLINOIS.

BRIEF ON BEHALF OF DEFENDANT IN ERROR.

MAY IT PLEASE THE COURT:

This is a writ of error to the Supreme Court of Illinois, sued out to secure a reversal of the affirming order of that court in the case of *Illinois Central Railroad Company* v. *The City of Chicago*, 173 Ill., 471.

It is claimed by plaintiff in error that under its charter it has an *irrevocable* contract under which it may fill up and appropriate the ground under the waters of Lake Michigan for its private use, at any time. It attempted to fill in about four acres lying under part of Lake Michigan on which to build a round house, at 27th street, in the City of Chicago, and was prevented from so doing by the city. This interference by the city and the action of the Supreme Court of Illinois in affirming a decree of the Superior Court of Cook County, Illinois, dismissing the bill of plaintiff in error praying for an injunction against such interference, constitutes, it is alleged, an impairment

of that contract within the prohibition of the constitution of the United States.

The bill alleges that the charter gives the company the right to take for its private use any land under Lake Michigan,

> "provided that the use of such lands and waters does not interfere with navigation on Lake Michigan, having reference to the manner in which commerce is conducted thereon [and that such charter] was and is a contract between the State of Illinois and your orator, *is irrevocable*, and confers upon your orator *a vested and continuing right to use the shallow waters and submerged lands of Lake Michigan* for such purposes when such use is reasonably necessary for the business of your orator, provided the same does not interfere with the navigation of the lake, having reference to the manner in which commerce is conducted thereon. And your orator avers that any law of the State of Illinois, or *any judgment, decree or decision of any court or tribunal thereof*, which denies or in any way impairs the right of your orator under the provisions of its said charter to use the submerged land of Lake Michigan for the purpose of constructing and using engine-houses, shops and other buildings thereon, when the same is reasonably necessary, and does not interfere with navigation on the lake, for the construction, completing, altering, maintaining, preserving and complete operation of the road of your orator for the purpose of accomplishing the purposes described and provided by its said charter, *impairs the obligation of the contract created by said charter* between the *state and your orator*, and is in violation of section 10, article 1, of the constitution of the United States, which provided that no state shall pass any law impairing the obligation of contracts." (Rec., 18.)

The bill recites at great length the growth of the Illinois Central Railroad and its increasing business and alleges that it needs a new round house, and

> "under the power, authority and right given and vested in it, under and by its charter, and in the exercise of its rights as riparian owner, your orator *elected and determined* to locate and construct said engine house on land submerged by the shallow waters of Lake Michigan" at 27th street. (Rec., 20.)

It then sets out that the Secretary of War, by letter of August 14, 1897, consented to the rebuilding of the breakwater. The text of the letter (Rec., 21) is that in answer to plaintiff's letter

> "requesting permission to repair certain piers belonging to your company, the war department will interpose no objection thereto."

But in that letter is mentioned no request, made by plaintiff in error, or granted to it, for permission to fill up four acres of Lake Michigan for an engine house. The position of plaintiff in error would seem to be fatally defective at the very threshold of its case. Permission from the United States government to *repair* a *pier* certainly cannot be construed to include the power to fill and occupy four acres of navigable water for an engine house. The letter of the Secretary of War speaks of a *pier*, a structure used in furtherance of commerce, a legitimate structure out into navigable water where it does not interfere with the public right of navigation; but if the plaintiff in error should have made the very different request for leave to fill up the waters in question for a round house, a very different answer would probably have been forthcoming. It is provided in section 8 of plaintiff's charter that

> "nothing in this act contained shall authorize said corporation to make a location of their track within any city without the consent of the common council of said city."

This must be held to mean location of track or other structures, depots, engine houses or otherwise, over the streets, or any part of the lands contiguous to this city, under Lake Michigan, or any other public property over which the police powers of the city extend.

Until the present attempt of plaintiff in error, it has always recognized the necessity of getting the city's consent for any invasion it desired to make upon such public property. In the case of *Illinois Central Railroad Co.* v. *Rucker*, 14 *Ill.*, 353, the Supreme Court decides in favor of plaintiff in error expressly upon the ground that it had obtained the consent of the city council before locating its depot. Reading on page 359:

> *Per Curiam.* 1. That the relator has the right by its charter to locate the road over the premises in question, the City of Chicago having assented."

So the case relied on by plaintiff in error as an early construction of its charter holds that under such charter the city must assent to the taking of any public property within its jurisdiction.

Plaintiff in error did not locate its road and put up its depot in Chicago in the beginning *as a matter of right under its charter*, but only by permission of the city, expressed through an ordinance, directing much of the road to be built on land under Lake Michigan, and then only upon terms that the company would construct and keep open a fifty-foot street on the west line of the depot grounds. If the rights of the railroad were so strictly construed in those early days, when the one idea of the community was to get a railroad at any cost, judge of the temerity of plaintiff in error in asserting forty-eight years afterwards that it has an "irrevocable" contract conferring upon it

> "a vested and continuing right to use the shallow waters and submerged lands of Lake Michigan!"

In 1852 its "vested" right was entirely subject to the will of the city council of Chicago, and the council then granted the right only on hard conditions.

And in the *Rucker* case the Supreme Court of Illinois so construed the contract in terms.

A great part of the plaintiff's argument is directed to the point that the parcel of submerged land attempted to be seized is small and that no private or public rights are endangered or prejudiced thereby. But the size of the tract in question is not material. The principle involved is as wide as Lake Michigan and as deep as its deepest point, because if plaintiff can

> "elect and determine to locate and construct said engine house on [this four acres of] land submerged by the shallow waters of Lake Michigan" (to quote the language of the bill), it can with as much right "elect and determine"

to take an equal width of submerged land throughout its entire length, from 16th street to 51st street (where its line leaves the lake shore). Not only that, but as the filling-in process will cause the lake at its outer edge (now about ten feet deep) to become gradually shallow, it can again, under its "irrevocable" contract, "elect and determine" to seize other widths of 200 feet of land covered by the then shallowed waters of Lake Michigan, and so on to the end of time—and the lake.

BRIEF.

I.

The writ of error must be dismissed for want of jurisdiction. There is no federal question involved.

Winona & St. Peter R. R. v. *Plainview,* 143 U. S., 393.

Water Power Co. v. *Water Commissioners,* 168 U. S., 349; reading on pages 371-4.

171 U.S. 38.
171 U.S. 641
172 U.S. 636
173 U.S. 419.
174 U.S. 91.

N. O. Water Works v. *La. Sugar Co.,* 125 U. S., 18, reading on pp. 30, 38-9.

Bacon v. *Texas,* 163 U. S., 207, reading on page 216.

Central Land Co. v. *Laidly,* 159 U. S., 103, 109, 110.

The control of the City of Chicago over the submerged lands in front of the city under its charter in force at the time plaintiff in error's charter was granted was, if any different, greater than that given by the act of 1872.

Illinois Central Railroad Company v. *Rucker,* 14 Ill., 353, reading on page 356.

II.

The state cannot grant lands under the waters of Lake Michigan to private parties, except in aid of commerce, or to build piers and docks in aid of navigation, unless in particular cases small specific parcels might be granted; but no general grant can be made, to be utilized in the discretion of the grantee.

Illinois Central Railroad Company v. *Illinois,* 146 U. S., 387, reading on pages 451-2-3-5.

Diedrich v. *N. W. U. R. Co.,* 42 Wis., 248.

Water Power Co. v. *Water Commissioners,* 168 U. S., 349, reading on pages 371-373.

Chicago, etc., R. R. v. *Nebraska,* 170 U. S., 57, reading on page 72.

The People v. *Kirk,* 162 Ill., 138, reading on pages 147, 151, 153.

Chicago, etc., Ry. v. *Minnesota,* 134 U. S., 418, reading on page 455.

Illinois Central Railroad Company v. *The City of Chicago,* 173 Ill., 471, reading on pages 485, 487.

III.

The charter of plaintiff in error of February 10, 1851, must be strictly construed. All intendments must be taken against plaintiff in error.

Shively v. *Bowlby,* 152 U. S., reading on page 10.

In the matter of Swigert, 119 Ill., 83, reading on page 89.

Hamilton Gas Light and Coke Co. v. *Hamilton County,* 146 U. S., 258, reading on pages 268-9.

4 Thompson's Commentaries on the Law of Corporations, § 5,661, and authorities cited.

Endlich on Interpretation of Statutes, 1888 Ed., § 354, pp. 495-6.

Raleigh v. *Reed,* 64 N. C., 155.

Sutherland on Statutory Construction, § 378.

N. W. Fertilizing Co. v. *Hyde Park,* 70 Ill., 634.

State v. *Black River Phos. Co.,* 21 L. R. A., 189. reading on pp. 197, 199.

Sage v. *Mayor, etc.,* 47 N. E. Rep., 1096, reading on page 1102.

IV.

If section 3 of its charter gave plaintiff in error the right to fill in and occupy part of the submerged lands under Lake Michigan it could not have been a continuing right.

The discretion as to what parcels of submerged lands can be taken without detriment to public interest is a governmental power, and cannot be surrendered by the legislature.

The legislature of 1851 had not the power to alienate and surrender the discretion of future legislatures in the matter of submerged lands, held by the state in trust.

The claim that such a grant is contained in the charter and that, with the acceptance by plaintiff in error, it constitutes an inviolable contract, is untenable.

Ill. Central Case, 146 U. S., reading on pp. 452-5, 459, 460.

Water Power Company v. *Water Commissioners*, 168 U. S., 349, reading on page 372.

People v. *Kirk*, 162 Ill., 139.

Beer Company v. *U. S.*, 97 U. S., 25.

Cooley on Principles of Constitutional Law, 3d Ed., pp. 112, 334.

In the Illinois Central case, reading on page *460*, this court says:

> "The legislature could not give away nor sell the discretion of its successors in respect to matters, the government of which, from the very nature of things, must vary with varying circumstances. The legislation which may be needed one day for the harbor may be different from the legislation that may be required at another day. Every legislature must, at the time of its existence, exercise the power of the state in the execution of the trust devolved upon it. We hold,

therefore, that any attempted cession of the ownership and control of the state in and over the submerged lands in Lake Michigan, by the act of April 16, 1869, was inoperative to affect, modify or in any respect to control the sovereignty and dominion of the state over the lands, or its ownership thereof."

V.

The only grant in the charter, so far as waters are concerned, is of *streams*. The legal status in Illinois of land under streams is different from that of lands under Lake Michigan. The title to the latter is in the state, in trust, to the former, in the riparian owner to the middle of the *stream*. *Streams* cannot be held to include Lake Michigan or its waters.

Illinois Central Railroad Company v. *The City of Chicago*, 173 Ill., 471.

Hardin v. *Jordan*, 140 U. S., 371, reading on pages 381-2.

Fuller v. *Shedd*, 161 Ill., 462, 475, 493.

VI.

The words of the grant are clear and cannot be misunderstood. There is no need of construction.

The grant is of lands and "streams." To prevent any misunderstanding the grant recites later:

> "Provided, that the navigation of *such streams* shall not be interfered with."

The only mention of "waters" is of "such waters," referring, of course, to the waters previously described. The only waters mentioned prior thereto are "streams."

A general description "following a specific enumeration

of objects or things, will be held to include only such things or objects as are of the same kind as those specifically enumerated."

In re Swigert, 119 Ill., reading at the top of page 89.

Where words are plain and no ambiguity arises, no construction is permitted, the words themselves must be taken as written.

Sutherland on Construction of Statutes, § 237.
Martin v. *Swift*, 120 Ill., reading on page 490.
Sullivan, etc., v. *Richardson, etc.*, 33 Fla., reading on page 121.

VII.

If the grant were continuing and were as claimed by plaintiff in error in other respects, plaintiff in error could still only take such parcels as were assented to by the city.

The consent of the city is necessary to prevent plaintiff in error locating its line, switching tracks, round-houses, etc., arbitrarily on the city's front.

Rucker v. *Ill. C. R. R. Co.*, 14 Ill., 353.
Charter of Plaintiff in Error, Sec. 8.

The Lake Front cases expressly recognize the necessity of the consent of the city being given.

146 U. S., reading on pp. 442, 443, 445.

On page 445, the court says:

"The extent to which it (the company) could reclaim the land under the waters was limited by the *conditions of the ordinance.*"

VIII.

The United States Supreme Court in the Lake Front cases, 146 U. S., *supra,* in no respect recognizes any validity in the claim of the plaintiff in error. It decides that the ownership in the submerged lands between Randolph street and Park Row is in the city; that plaintiff in error, in front of section 10, north of Randolph street, and between Park Row and 16th street, is the riparian owner, and that as such riparian owner it has the right to "wharf out" to navigable waters in aid of navigation. It calls the structures in front of section 10, and between Park Row and 16th street, "piers" and "docks," "slips" and "wharves," says they were put there because they are "piers" and "docks," but remands the case to the Circuit Court to ascertain if these "piers" and "docks" interfere with navigation. Nowhere in that decision does the court recognize the right of a riparian owner to fill in the lake in order to build a round-house, or plaintiff in error's right to fill any part of the lake at the present time under section 3 of its charter, or at any time, without the city's consent.

On the contrary, it is distinctly held that the act of 1869 was "inoperative to affect, modify or in any respect to control the sovereignty and dominion of the state" over these submerged lands.

The "discretion" of successive legislatures would be "given away" and "sold" to a greater and more objectionable degree by the charter of 1851, did it provide, as claimed by plaintiff in error, that it could at any time elect to take any land under Lake Michigan for its private uses, than by the act of 1869, expressly held to be "inoperative."

Illinois Central Case, 146 U. S., reading on pages 446, 447, 449, 460 and 464.

IX.

The opinion of Mr. Justice HARLAN, in the Circuit Court, in the Lake Front case, 33 Federal Reporter, 730, raises the question of the power of plaintiff in error to make further encroachments on the land under Lake Michigan without a specific grant from the state. The opinion says, reading on page 758:

> "Whether the railroad company, in its erection of wharves, docks, piers and other structures, has not gone as far as it may go without interrupting the navigation of the lake, or whether it could lawfully erect other structures on the lake without authority from the legislature of the state, are questions which the court is not now required to determine."

X.

If the grant gives a continuing right, the proviso in section 8, that the consent of the city council must be first obtained, is also continuing, and refers not only to new structures contemplated within the old limits of the city of Chicago, but also to any proposed aggression on the lake shore within the present limits of the city. The shore between 25th and 27th streets, is as much within the city limits to-day as was the foot of Randolph street in 1852.

The Rucker case, *supra*, distinctly bases the right of plaintiff in error to build its depot in the lake at Randolph street, because it had obtained a city ordinance to that effect. That was for the reason that that part of the lake was *in the city limits;* so is the foot of 25th and 27th streets to-day.

The city's authority, under existing statutes, is prac-

tically the same as under its charter existing at the time the charter of plaintiff in error was granted.

Rucker v. *Illinois Central R. R. Co.,* 14 Ill., reading on page 356.

Cummings et al. v. *City of Chicago,* 144 Ill., 563, reading on bottom of page 568.

People v. *Hinrichsen,* 161 Ill., 223, reading on page 227.

XI.

Whether or not the harbor, technically defined, extends to 25th street, the lake shore at that point is within the city limits. The road is forbidden to take any land, stream, etc., for its use "within any city" without the city's consent. (Sec. 8, Charter.)

Par. 72, Chapter 24, Starr & Curtis, 1896, provides:

> "The city or village government shall have jurisdiction upon *all waters* within or bordering on the same, to the extent of three miles beyond the limits of the city or village, but not to exceed the limits of the state."

The charter of Chicago, in 1863, still in force, by virtue of sections 11 and 12, chapter 24, Revised Statutes Illinois, gave to the city authority "to preserve the harbor * * * to prevent and remove all obstructions therein, and punish the authors thereof."

Art. 53, Sec. 8, Ch. 4, Laws and Ordinances, 1866.

It also gave to the city powers that *do not depend upon whether the part of the lake in question is technically within the harbor.*

It authorizes the city authorities "to remove and prevent all obstructions in the waters which are public highways of said city, and to widen, straighten and deepen the same."

Art. 2, *ibid.*

The Supreme Court has decided that the powers of the city over the harbor rest on the old charter as well as on the general statutes.

Harmon v. *City of Chicago,* 140 Ill., 374.

As we have seen in the Rucker case, the city's powers under the charter existing in 1851 were still larger in regard to the waters of Lake Michigan and the submerged lands thereunder, so there can be no claim of any federal question by reason of the impairment of any contract by subsequent legislation.

ARGUMENT.

I

It is respectfully submitted that the writ of error must be dismissed for want of jurisdiction. The bill and assignment of errors set up jurisdiction in this court to consider the writ of error because a federal question is involved, that under the charter of 1851, upon acceptance by plaintiff in error, an inviolable contract was entered into, by which plaintiff in error has a vested right to fill in the submerged lands of Lake Michigan to build round-houses, etc., at any point along its right of way where it owns the riparian rights (*i. e.*, from 16th to 51st streets) in said city of Chicago, in its discretion, the only condition being that navigation shall not be affected.

This appropriation of public submerged land, according to plaintiff in error, can be made at any time without notice to state or city, in such parcels as the railroad "elects" to take.

In practice, the notice to the United States government seems also to be dispensed with, since the record shows no application to the government for leave to fill in the four acres of lake for a round-house, but only is an application for leave to "repair" a "pier."

It has long been settled that the impairment of a contract within the meaning of the constitution must be affected by legislative enactment, and by legislative enactment only.

In the N. O. Water Works Case, 125 U. S., reading on page 30, the court says:

> "In order to come within the provision of the constitution of the United States, which declares that no state shall pass any law impairing the obligations of contracts, not only must the obligation of a contract have been impaired, but it must have been impaired by the law of the state. The prohibition is aimed at the legislative power of the state, and not at the decisions of its courts, or the acts of administrative or executive boards or officers, or the doings of corporations or individuals.
>
> This court, therefore, has no jurisdiction to review a judgment of the highest court of a state, on the ground that the obligation of a contract has been impaired, unless some legislative act of the state has been upheld by the judgment sought to be reviewed. The general rule, as applied to this class of cases, has been clearly stated in two opinions of this court, delivered by Mr. Justice MILLER: 'It must be the constitution or some law of the state, which impairs the obligation of the contract, or which is otherwise in conflict with the constitution of the United States; and the decision of the state court must sustain the law or

> constitution of the state, in the matter in which the conflict is supposed to exist; or the case for this court does not arise.' *Railroad Co.* v. *Rock*, 4 Wall., 177, 181. 'We are not authorized by the judiciary act to review the judgments of the state courts, because their judgments refuse to give effect to valid contracts, or because those judgments, in their effect, impair the obligation of contracts. If we did, every case decided in a state court could be brought here, where the party setting up a contract alleged that the court had taken a different view of its obligation to that which he held.' *Knox* v. *Exchange Bank*, 12 Wall., 379, 383."

In the exuberance of pleading, plaintiff in error sets out in its bill that its alleged contract is impaired by "any judgment, decree or decision of any court or tribunal" of Illinois, but counsel, on pages 11 and 12 of his brief, reduces plaintiffs' claim to the position that the city is interfering with plaintiff's work by virtue of ordinances passed since the city adopted the Cities and Villages Act of 1872, and that, therefore, plaintiff's alleged contract is impaired.

But the city had, in 1851, if anything, greater powers over the lands under Lake Michigan on its front under its charter than it has now, as shown in the Rucker case, in the 14th Illinois, and any privilege granted to plaintiff in error, by its charter, was subject to the powers of the city then existing.

The court says, in the Rucker case, reading on page 356:

> "The charter of the city of Chicago declared the bed and waters of the lake, over and in which the railroad was located, a part of the city and harbor of Chicago, and the common council were empowered to regulate, control and protect the same in their discretion."

As the city limits were extended, in the same way the

rights of the city to "regulate, control and protect the bed and waters" in front of the annexed territory was extended. The provisions of the act of 1872 and the ordinances since adopted in no respect extend or increase the powers of the city in this respect, so that the authority under which the city now resists the encroachments of plaintiff in error upon the public domain held in trust, is the same authority existing at the time the charter of 1851 was granted to plaintiff, and subject to which it was granted. There is, consequently, no impairment of any contract worked by any legislation passed subsequent to the granting of the charter, and therefore no federal question can arise.

This court says further in the N. O. Water Works case, reading on page 38:

> "When the state court decides against a right claimed under a contract, and there was no law subsequent to the contract, this court clearly has no jurisdiction."

Reading on page 39, the court says in the same case:

> "In the present case, the Supreme Court of Louisiana did not, and the plaintiff in error does not pretend that it did, give any effect to the provision of the constitution of 1879, abolishing monopolies. Its judgment was based wholly upon the general law of the state, and upon the construction and effect of the charter from the legislature to the plaintiff company, and of the license from the city council to the defendant company, and in no degree upon the constitution or any law of the state subsequent to the plaintiff's charter. The case cannot be distinguished in principle from the cases above cited, in which writs of error to state courts have been dismissed for want of jurisdiction. As was said in *Bank of West Tennessee v. Citizens' Bank of Louisiana*, above cited, 'The result in this case would have been necessarily the same

> if the constitution had not contained the provision in question.'
>
> Writ of error dismissed for want of jurisdiction."

And so in the case at bar, although plaintiff in error states that its claim rests on the passage of the act of 1872 and the acts of the city thereunder, it is obvious that the decree of the Supreme Court of Illinois is based entirely upon

> "the construction and effect of the charter from the legislature to the plaintiff company" and "in no degree upon * * * any law of the state subsequent to the plaintiff's charter."

And as in that case, so in this,

> "The results in this case would have been necessarily the same" if the law of 1872 had never been passed, or adopted by the city of Chicago.

As to any other ground of federal jurisdiction except that of impairment of plaintiff's alleged contract, the cases are equally conclusive.

Equal protection of the laws is not denied to a person or corporation where the same procedure is applied to the litigant in question as to all others in the same forum.

Tinsley v. *Anderson*, 171 U. S., 101.

The adjudication of a person's claims by the courts of his own state is due process of law.

Morley v. *Lake Shore*, 146 U. S., 162.

II.

The question on the merits now before the court is a simple one and, we submit, was definitely settled in the Illinois Central case in the 146 U. S.

It is whether, as claimed by plaintiff in error, the state

legislature can surrender the governmental control over these submerged lands held in trust, whether it can surrender the legislative discretion of future legislatures in regard to this trust domain?

In the last mentioned case, the court decides, reading on page 460, that the act of 1869

> "was inoperative to affect, modify or in any respect to control the sovereignty and dominion of the state over the lands, or its ownership thereof."

But the act of 1869 was in no respect as obnoxious as surrendering governmental power, as would be section 3 of the charter of 1851, if the force thereof were as plaintiff in error claims.

That act attempts to convey to plaintiff in error the bed of Lake Michigan for the distance of one mile east of its tracks, from about Randolph street to about 16th street, in the city of Chicago. This is a definite tract, away from the regular path of navigation, which goes north and east, and so far as any material results are concerned, aside from its size, its grant to the railroad would be little more objectionable than that of the four acres here in question.

Yet this court rightly characterizes that act as a surrender of governmental power, as an abdication of the general control of the state over the submerged lands. The court says, reading on page 455:

> "The ownership of the navigable waters of the harbor and the lands under them is a subject of public concern to the whole people of the state. The trust with which they are held, therefore, *is governmental* and *cannot* be *alienated*, except in those instances mentioned of parcels used in the improvement of the interest thus held, or when parcels can be disposed of without detriment to the public interest in the land and waters remaining."

On the same page the court says:

> "Surely, an act of the legislature transferring the title to its submerged lands and the power claimed by the railroad company, to a foreign state or nation would be repudiated, without hesitation, as a gross perversion of the trust over the property under which it is held. So would a similar transfer to a corporation of another state. It would not be listened to that the control and management of the harbor of that great city—a subject of concern to the whole people of the state—should thus be placed elsewhere than in the state itself. All the objections which can be urged to such attempted transfer may be urged to a transfer to a private corporation, like the railroad company in this case."

Yet plaintiff in error claims that by its charter of 1851, it has the *irrevocable* right, in its own discretion, at any time, to elect to take any part of the submerged lands under the lake adjacent to its right of way not specifically included in the decision in 146 U. S., *i. e.*, any part of the lake front of this city from 16th street to 51st street.

That election to decide what parcel shall or shall not be taken, is a governmental power that cannot be abdicated, under this decision. Granted, for the sake of argument, that the legislature can give to plaintiff in error specific parcels of these submerged lands when public interests will not suffer and practical navigation not be interfered with, nevertheless it must be the legislature *at that time* that elects what parcel shall be granted—the surrender of that right to elect cannot be made under this Illinois Central decision.

Reading on page 453, the court further say in that case:

> "The state can no more abdicate its trust over property in which the whole people are interested, like navigable waters and soils under them, so as to leave them entirely under the use and control of private

> parties, except in the instance of parcels mentioned for the improvement of the navigation and use of the waters when parcels can be disposed of without impairment of the public interest in what remains, than *it can abdicate its police powers* in the administration of government and the preservation of the peace."

The abdication to a railroad company of the *election to choose* such part of submerged lands as it desires for its private use is leaving such submerged lands under the "use and control" of the company, as much as a specific grant. In the particular case, the *abdication* claimed to have been made by the legislature in the charter of 1851 is much broader than the *abdication* specifically made in the act of 1869 and condemned as void by this court, because if the charter of 1851 gave the power of election for all time to come as claimed, plaintiff in error could thereunder elect to fill out in front of section ten for a round-house or in front of 16th street or of any other part of the city's front as well as in front of 27th street.

The case in 146th U. S. decided that the city was the owner of the front of the greater part of section 10, but up to that decision, if plaintiff in error is right now, it might well have "elected" to build its round-house in front of the Auditorium, and according to its own statement can now fill out and build engine houses and machine shops anywhere from 16th street to 51st street.

We believe that this Honorable Court has already in the 146 U. S. definitely and finally settled this question, but there are other opinions of this court along the same line, and it is certain that wherever the subject has been approached the Supreme Court has set its seal of condemnation on any such claim as that set up by plaintiff in error.

Thus in the case of *Water Power Company* v. *Water Commissioners,* 168 U. S., where the Water Power Company claimed rights under their charter similar to those claimed by plaintiff in error, the court says, on page 372:

> "There was no contract by virtue of these charters that the companies should always and for all time be entitled to all the natural flow of the water in the river without regard to the right of the state as above mentioned. The claim made by the complainant seems to us most extravagant. The state or any particular subdivision thereof acting under its authority would, if these claims were valid, be forever thereafter prevented from using any portion of the waters of the river for any public purpose unless compensation for such use were first made these plaintiffs. This construction of the meaning of the charters *assumes the power* of a territorial or *state legislature* to *bind future legislatures* in dealing with these *public rights,* and it prevents the latter from providing for the use of any portion of the waters for public purposes of the most important character without first making compensation to the plaintiffs for that use. If we *should assume the validity of an act* of the legislature of *such a character* (which under the decision of this court in *Illinois Central Railroad* v. *Illinois,* 146 U. S., 387, is at least doubtful), *it is clear that we ought not to adopt a construction leading to that result unless the legislative act be plain and beyond all doubt."*

The italics are ours.

We submit that the decision of this court on this point distinctly declares such legislation to be invalid. The court says in the Illinois Central cases, reading on page 460:

> "The legislature could not give away nor sell the *discretion of its successors* in respect to matters, the government of which, from the very nature of things, must vary with varying circumstances. * * * Every legislature must, at the time of its existence, exercise the power of the state in the execution of the

> trust devolved upon it. We hold, therefore, that any attempted cession of the ownership and control of the state in and over the submerged land in Lake Michigan by the act of April 16, 1869, was *inoperative to affect, modify* or in any respect to control the sovereignty and dominion of the state over the lands, or its ownership thereof."

To the same effect is the decision of this court in the case of *Chicago, etc., R. R.* v. *Nebraska,* 170 U. S., 57, where it was claimed as here, that the obligation of a certain contract was impaired.

This court says, reading on page 72, that persons making contracts involving public rights, are presumed to know that such subjects cannot be withdrawn from the police power of the legislature. In the Illinois Central case, reading on page 459, the court says:

> "The soil under navigable waters being held by the people of the state in trust for the common use and as a portion of their inherent sovereignty, any act of legislation concerning their use affects the public welfare. It is, therefore, appropriately within the exercise of the police power of the state."

Under this ruling, the state's police power being the same as that in regard to health, safety and similar questions, this Nebraska case is exactly in point.

In the Nebraska case it is said that the city is the agent of the state in the particular matters involved. And so here, the city was made the agent of the state in the matter of the submerged lands in front of Chicago in the city charter in force in 1851, and is made such agent in the law of 1872.

The decision of this court in *Beer Company* v. *U. S.*, 97 U. S., 25, is to the same effect as the Nebraska case, that the police power of the state cannot be surrendered by legislative enactment or contract.

The Supreme Court of Illinois, before its decision in the case at bar, had definitely adopted the position of this Honorable Court on this question.

In the case of *The People* v. *Kirk*, 162 Ill., 138, that court says, reading on page 147:

> "That the governmental control over the lands under Lake Michigan cannot be surrendered by the state, that specific parcels may be granted, but not the discretion of future legislatures."

So on page 151 the court says:

> "No attempt has been made by the legislature to relinquish its governmental powers or place them beyond the power of future legislation."

On page 153 the court says:

> "Grants by the legislature of small parcels are valid so long as they do not undertake to part with governmental power."

As we have seen, the discretion to "elect" what parcels shall be taken is of the very essence of governmental power.

We submit that the argument of counsel for plaintiff in error in no particular meets the issue or in any way detracts from the force of this court's decision in the Illinois Central case.

The opinion of the Supreme Court of Illinois in this case first finds that the construction of the grant contained in the charter is not as claimed by plaintiff, and then says, reading on page 485:

> "That even if the grant were as claimed, it does not follow that the railroad company would have the right, at any time it might see proper, to take and appropriate to itself any of the lands covered by the waters of Lake Michigan, provided only that the navigation of the lake is not interfered with."

and reaches practically the same conclusion as this Honorable Court, on the authority of the decision in the 146th U. S., quoting from the same.

Counsel says that if the legislature granted this four acres, there would be no question; but that is not the issue before the court. There has never been a grant of this four acres. It is the claim of plaintiff in error of the right to elect at any time what parcel or parcels it needs that is at issue.

The city was, by its charter subsisting in 1851, the agent of the state, touching the police supervision of these submerged lands, and its fixing of the location of the tracks and depots of plaintiff in error, by its original ordinance (thus giving the consent required by the railroad charter), might be held to have been a valid exercise of authority and a valid carrying out of the grant to plaintiff in error; but if so, that was all that the legislature had the power to do, and when afterwards plaintiff in error needed other parcels of these submerged lands, under the decision in the 146th U. S., it must have gone to subsequent legislatures for such grants as such legislatures "elected" to make it.

So that counsel's position is untenable; even if the authority to select parcels were validly granted to be exercised in 1852, it could not be exercised now, and if such grant was intended by that legislature, it would be invalid and void.

Counsel's appeal to the doctrine of estoppel, based on the assumption that plaintiff is the object of commiseration in owning this right of way along the lake front, would entertain any one familiar with the city of Chicago, where the immense and unique value of plaintiff's property

has been the envy of all competitors, and far surpasses in every element the right of way of any other railroad company coming into the city.

Counsel attempts to evade the force of the decision in the 146th U. S. by stating that plaintiff in error does not claim arbitrary power, that there must be in each case a *reasonable necessity for the appropriation*, and the locality selected must be *reasonably fit* for the purpose. But plaintiff in error claims the right at all times to "elect" when it is reasonably necessary to *appropriate the trust property* and what parcel or parcels thereof is or are *reasonably fit* for its private purposes, and arrogates to itself the perpetual right to decide, when public convenience and public rights are not interfered with and impaired. But counsel fails to see that it is this very right to make these "elections" that, according to the case in the 146th U. S., cannot be surrendered by the legislature.

To the same effect is the case of *Water Power Company* v. *Water Commissioners*, 168 U. S., *supra*. Reading on page 372, the court says, speaking of an act attempting to bind future legislation in dealing with public rights:

> "If you should assume the validity of an act of the legislature of such a character" (which under the decision in *Illinois Central Railroad* v. *Illinois*, 146 U. S., 387, is at least doubtful) "it is clear that we ought not to adopt a construction leading to this result unless the legislative act be plain and beyond all doubt. We are of opinion that these particular charters of the plaintiffs are not thus to be construed. * * * But there is no language in the acts providing that the companies *shall thereafter and always have the right* to the use of all the natural flow of the water down the river. Nor is such right a necessary and legal consequence of the language used. * * * It is difficult to believe that a legislature would ever grant to individuals or companies rights of that na-

> ture, even if it be assumed it had the power. * * * It cannot be supposed that the legislature meant by any grant of this kind to warrant that for all future time no part of the water that might otherwise naturally flow down the river should ever be used under the authority of the state for any public purpose, without compensating the plaintiffs for that diversion."

So here there is no language in the charter that plaintiff shall "thereafter and always have the right to the use of" any of the submerged lands under Lake Michigan adjoining its right of way that it shall deem reasonably necessary for its private use, and that it can appropriate without, in its judgment, injuring public rights. "Nor is such right a necessary and legal consequence of the language used."

Counsel argues that the Rucker case in the 14th Illinois, the ordinance of the city fixing plaintiff's right of way, and the act of 1869, all show that the construction claimed by plaintiff was the construction put upon the act by the state and city.

But the ordinance passed by the city, so far as the location of the plaintiff's road over the submerged lands is concerned, might as well be held to be the act of the state, by its agent, under the powers granted the city by its charter. On page 356, the court says, in the Rucker case:

> "The charter of the city of Chicago declared the bed and waters of the lake, over and in which the railroad was located, a part of the city and harbor of Chicago, and the common council were empowered to regulate, control and protect the same in their discretion."

The city ordinance provided for the location of the right of way and structures partly over the submerged lands, and the actual issue before the court was whether a mandamus

would issue compelling the court to act in a suit brought by the railroad company to condemn a lot abutting on Lake Michigan. The court distinctly says the city had control of the bed of the lake under the charter, and the location of the road over the lake was valid—"the city having assented." Here again the location was recognized as valid as much on account of the city's powers under its charter as on account of any right of plaintiff under its charter.

We do not think the act of 1869 helps plaintiff's contention. That act reads:

> "Sec. 3. The right of the Illinois Central Railroad Company, under the grant from the state in its charter, * * * and under and by virtue of its *appropriation, occupancy, use and control* * * * in and to the lands submerged or otherwise, lying east of the said line running parallel with and four hundred feet east of the west line of Michigan avenue, in fractional sections ten (10) and fifteen (15), township and range as aforesaid, is hereby confirmed."

Since the words of this act are to be taken against the railroad company as well as those of the charter of 1852, we fail to find any aid and comfort for plaintiff. "The right" of plaintiff confirmed "under the grant from the state in its charter" must be taken to attach to the lands "otherwise" than "submerged," because as we have seen, the submerged lands are held in trust and can only be alienated by express anactment, if at all. "The right" of plaintiff "under and by virtue of its appropriation, occupancy, use and control" in and to the *lands submerged* and lying east of this line is also hereby confirmed, but it must be held to be a ratification by the legislature of the prior taking of the submerged lands by the company.

This court has often held that where a legislature has power to make a particular grant, and parties take without a grant, the legislature can thereafter ratify such taking, and such ratification gives the same right as if an original valid grant had been made.

So, in this case, the ratification of 1869 might have been thought to help the original location of right of way and depots by the city ordinance, over the submerged lands, and particularly to strengthen plaintiff's rights in the very considerable additional piers and docks described at length in the case in the 146th U. S.

The legislature could from time to time have granted these several parcels, and the railroad, having taken them without grants, or with grants of doubtful validity, the ratifying act of 1869 was intended to give plaintiff as good title as an original grant could have done. We believe that this is the proper and inevitable construction of the act of 1869.

Certainly, it will not be held that any language in the act of 1869 could be construed to surrender the governmental control of the state over those submerged trust lands, because this court has said in the 146 U. S. that that act was powerless to accomplish that. If it cannot be held to surrender the public rights directly, how can it be held to be such a construction of the company's charter of 1851 as to work such a surrender of public rights by that charter, thus doing indirectly what this court has held it cannot do directly?

The act will not be held to give plaintiff in error indirectly rights which this court has already decided it could and did not give directly.

But any language in the act of 1869 or in plaintiff's charter that is claimed to affect public rights will be taken

against plaintiff, because it will be held to be the language of plaintiff's agents and promoters and not the language of the legislature.

> "Their language [*i. e.,* the language of charters] is treated as the language of their promoters, who asked the legislature for them, the promoters rather than the legislature being considered as the framers; and when doubt arises as to the construction of that language, the maxim, *'verba cartarum fortius accipiuntur contra proferentem,'* or that words are to be understood most strongly against those who use them, is justly applied. The benefit of the doubt is to be given to those who might be prejudiced by the exercise of the powers which the instrument grants, and against those who claim to exercise them."
>
> *Raleigh* v. *Reid,* 64 N. C., 155.
>
> Endlich on Interpretation of Statutes, 1888 Edition, p. 494.

III.

But we submit that the decision of the Illinois Supreme Court is correct as to the construction of the language in the charter of plaintiff in error, and that that charter must be construed strictly and all intendments must be taken against plaintiff in error.

The cases are unanimous on the point that all such grants must be construed strictly against the grantee.

This very question of the construction of this particular charter has been decided by the Illinois Supreme Court. In the case *in re Swigert,* 119 Ill., 83, the court says, reading on page 89, that this is a charter that requires strict construction.

In Thompson's Commentaries on the Law of Corporations, Vol. 4, Par. 5661, it is said that this rule that a

charter must be construed in favor of the public and against the corporation is "so simple that no man, whether

> lawyer or layman, can misunderstand or misapply it. That which a company is authorized to do by its act of incorporation it may do; beyond that all its acts are illegal. And the power must be given in plain words or by necessary implication. All powers not given in this direct and unmistakable manner are withheld. In such cases, ingenuity has nothing to work with, since nothing can be either proved or disproved by logic or inferential reasoning. If you assert that a corporation has certain privileges,show us the words of the legislature conferring them. Failing in this, you must give up your claim, for nothing else can possibly avail you. A doubtful charter does not exist, because whatever is doubtful is decisively certain against the corporation."

But, as determined by the Illinois Supreme Court, the language of the charter is plain and, upon the issues before the court, needs no construction. Section 3 of plaintiff's charter says that it shall appropriate land not exceeding 200 feet in width for right of way;

> "may enter upon and take possession of and use all and singular any lands, *streams* and materials of every kind * * * for the purpose of constructing station grounds, * * * engine houses, shops and the buildings necessary for the * * * complete operation of the road. All *such* lands, *waters,* materials and privileges *belonging to the state* are hereby granted to said corporation for said purposes; * * * Provided, that nothing in this section contained shall be so construed as to authorize the said corporation to interrupt the navigation of said *streams.*"

Plaintiff's counsel discuss quite exhaustively various definitions of the words "lands," "waters" and "streams," but the charter speaks for itself and the several words are

so used therein that they must bear their common meaning.

"Streams" and streams alone, of waters, are affirmatively mentioned.

"Lands" are always mentioned in direct connection with "streams" and "such waters," so "lands" in this charter can only mean dry lands. A grant of land on Lake Michigan never, except by express language, can include the land under the water—the grantee only takes to the water's edge.

The only possible way in which the legislature could grant these submerged lands would be by expressly reciting in the charter "lands under Lake Michigan," and of course, as we have seen, the grant could then be only of small parcels specifically described.

Plaintiff is empowered to enter upon and take "lands" and "streams" *belonging to* the state. If "lands" were used in the broad sense employed in some of the definitions set out by counsel, the legislature would not have gone on to enumerate "streams" and "such waters," it would have been useless.

Moreover, the only "lands" intended to be granted by the charter were the *public lands belonging to the state*, but these submerged lands did not *belong to the state*, were not public lands *in the sense that the state had the right to sell them* or dispose of them at the will of any legislature—they were and are *trust lands*—as decided by the court in the 146th U. S., not *belonging to* the state, but *held in trust* by the state. In addition to public lands *belonging to the state*, the charter granted "streams," no other waters are mentioned or described.

Further in this section 3,

> "All *such* lands, *waters* * * * *belonging to the state* are hereby granted to said corporation for said purposes * * *"

But that phrase, *"such lands, waters,"* must relate to the lands and waters previously mentioned, namely, lands and *streams,* the waters of *streams.*

A general description

> "following a specific enumeration of objects or things will be held to include only such things or objects as are of the same kind as those specifically enumerated." *In re Swigert,* 119 Ill., reading on page 89.

Under the same ruling the "lands" mentioned in both places are the same lands, those *"belonging to* the state," not these submerged lands held in trust by the state.

The state had the right to grant the bed of all streams, even of the Mississippi river, on which it owned lands, to plaintiff under the Illinois decisions, but it holds the bed of Lake Michigan under an entirely different title.

But in the last clause of the section the meaning of the language used is fixed beyond question:

> *"Provided,* that nothing in this section contained shall be so construed as to authorize the said corporation to interrupt the navigation of *said streams."*

Is it likely if the legislature intended in the earlier part of the section to grant the bed of Lake Michigan that it would insert a proviso that the navigation of *streams* only was not to be interrupted, thus leaving it within the "election" of plaintiff in error to interrupt the navigation of the lake?

Counsel attempts to explain away the exclusive use of the word "streams" in section 3 upon the hypothesis that

in 1851 it was understood in Illinois and elsewhere that the navigable streams of this state could not be crossed, bridged, etc., by railroads except upon the express authority of the state, and cites various railroad charters, but the argument cannot apply to section 3, because if such were the theory of the legislature in framing the charter of plaintiff in error, this right to cross streams, etc., is provided for specifically in its proper place, in section 10.

> "SEC. 10. Said corporation may construct their said road and branches over or across any *stream* or *water course*, road, highway, railroad or *canal* which the route of its road shall intersect, but the corporation shall restore the *stream* or *water course* * * * thus intersected to its former state * * *"

We thus see that the word "streams" could not have been inserted in section 3 for any other purpose than the plain one of granting *streams* and *streams* only.

The words "lands" and "streams" must be taken in their commonly received sense.

In Sutherland on Statutory Construction we find the correct rule:

> "SECTION 237. INTENT FIRST TO BE SOUGHT IN LANGUAGE OF STATUTE ITSELF. It is beyond question the duty of courts in construing statutes to give effect to the intent of the law-making power, and seek for that intent in every legitimate way. But * * * first of all in the words and language employed; and if the words are free from ambiguity and doubt, and express plainly, clearly and distinctly the sense of the framers of the instrument, there is no occasion to resort to other means of interpretation. It is not allowable to interpret 'what has no need of interpretation.' The statute itself furnishes the best means of its own exposition; and if the sense in which words were intended to be used can be clearly ascertained from its parts and provisions, the inten-

tion thus indicated will prevail without resorting to other means of aiding in the construction."

In *Deere* v. *Chapman*, 25 Ill., 498, the court says:

> "Where the words of a statute are clear and unambiguous, they must be taken in their ordinary, natural and most commonly received sense, and * * * statutes in derogation of the common law, not clearly remedial in their nature, should be construed strictly as against those seeking their benefits."

So "streams" doesn't mean "lakes" and charter granting "streams" excludes all other "waters."

In *Martin* v. *Swift, supra*, reading on page 490, the court says:

> "Words used must have their *natural* meaning unless some absurd or injurious consequence would result which the legislature manifestly could not have intended."

Although in the case in the 146th U. S. the claim set up by plaintiff in error was not as broad as that now made, this court took such a position as practically settles the broad claim made here and in so doing itself raised a doubt as to whether the word "streams" could be taken to have any other than its ordinary meaning. On page 444 the court says:

> "Whilst the grant to it (the railroad) included waters of streams on the line of the right of way belonging to the state, it was accompanied with a declaration that it should not be so construed as to authorize the corporation to interrupt the navigation of the streams. *If the waters of the lake* may be *deemed to be included* in the designation of *streams*, then their use would be held equally restricted."

IV.

Even if the grant were as broad as plaintiff claims, and gave it a continuing right to take parcels of submerged land at its election for its railroad purposes, nevertheless, in every case of such appropriation it must first secure the consent of the city authorities. The charter says in section 8:

> "Nothing in this act contained shall authorize said corporation to make a location of their track within any city without the consent of the common council of said city."

The city charter existing at that time

> "declared the bed and waters of the lake, over and in which the railroad was located, a part of the city and harbor of Chicago, and the common council were empowered to regulate, control and protect the same in their discretion." (*Ills. C. R. R.* v. *Rucker*, 14 Ills., 356.)

Reading on page 445 of the Illinois Central case, this court construes plaintiff's right under its charter as being dependent entirely upon the action of the city council.

> "The prohibition upon the company to make a location of its road within any city, without the consent of its common council, necessarily empowered that body to prescribe the conditions of the entry, so far, at least, as to designate the place where it should be made, the character of the tracks to be laid, and the protection and guards that should be constructed to insure their safety. Nor did the railroad company acquire by the mere construction of its road and other works any rights as a riparian owner to reclaim still further lands from the waters of the lake for its use, or the construction of piers, docks and wharves in the furtherance of its business. The extent to which it could reclaim the land under the waters was limited by the conditions of the ordi-

nance, which was simply for the construction of a railroad on a tract not to exceed a specified width, and of works connected therewith."

Language could not be stronger or clearer and plaintiff's claim is utterly dissipated by this finding of the court.

As at that time plaintiff's right "to reclaim the land under the waters was limited by the conditions of the ordinance," so to-day it can make no aggression whatever upon these submerged lands except upon first getting authority from the city council.

Now, as then, plaintiff acquired no right "to reclaim still further lands from the waters of the lake for its use" by the mere construction of its road and other works under its charter. So far as these public rights within the city limits are concerned, plaintiff's power to take now, as it then was, is "limited by the conditions of the ordinance" which the city council may grant. The ordinance from the city is a condition precedent for each individual taking. The fact that the city once allowed it to put its track or a building within the city's jurisdiction does not give plaintiff the right "to redeem still further lands from the waters of the lake."

The claim of plaintiff before the court in the Illinois Central case was not only as a riparian owner, but also under everything it might have by its charter, therefore where the court says that the company acquired no right as riparian owner to reclaim still further lands from the waters of the lake by the mere construction of its road and other works, the force of the finding is that neither as riparian owner or under its charter did plaintiff acquire the right by such construction of its road, etc., to reclaim any further submerged lands.

If at that date plaintiff's rights depended upon the city

ordinance and were limited thereby, still more would that be the case now.

The first ordinance of 1852 fixed plaintiff's right of way and certain yards, etc.; later, in 1855, it wanted more ground for a depot., etc., and another ordinance was passed, imposing certain conditions, among others, that a fifty-foot street must be built and maintained on plaintiff's land.

State of Illinois v. *Illinois Cent. R. Co.*, 33 Fed. Rep., rea ling on page 744.

Plaintiff in error had the same right in 1855 to fill in the parcel of submerged land on which to build its depot, without an ordinance and without conditions imposed by the city, that it has to-day to fill in the four acres at 27th street, but no more.

The general location of the road and its entrance into the city was as much fixed and consented to by the city, through this ordinance of 1852, then, as it is now; yet then, in order to reclaim additional submerged lands, it was required to secure the ordinance of 1855, and to-day to reclaim the four acres at 27th street, it must at least secure an ordinance from the city council, if not in addition thereto a specific grant from the legislature. As in 1852, so in 1897, the extent to which appellant could reclaim the "land under the waters was limited by the conditions of the ordinance" of 1852, and such additional ones as may have been passed since. It is certain that none has ever been passed covering this submerged land at 27th street.

The city's powers as agent of the state in regard to this submerged land at 27th street are the same now as they were over submerged lands in 1852.

We have seen what they were in 1852 by the Rucker case, in the 14th Illinois. By Par. 72, Chapter 24, Starr & Curtis, 1896, edition, it is provided:

> "The city or village government shall have jurisdiction upon all waters within or bordering on the same to the extent of three miles beyond the limits of the city or village, but not to exceed the limits of the state."

As the city limits have been extended from time to time until the whole lake front along which plaintiff's road ran was annexed, *i. e.*, down to about 51st street, we submit that there can be no question that plaintiff would be obliged to get the city's consent to any further reclaiming in front of such annexed territory, precisely as when it desired to reclaim land for its depot in 1855. Certainly, on this point, the decision in the 146th U. S. is conclusive.

V.

Counsel urges that the decision in this case in the 173d Illinois is not consistent with the Rucker case in the 14th Illinois, but there is no disagreement between the two opinions. In the Rucker case the road had the consent of the city authorities; in the case at bar the city authorities resist.

If it were held that the legislature of that day could surrender its own discretion as to the parcels of submerged land to be taken by the plaintiff, in the light of the decisions of this court, before referred to, that right in plaintiff of election could not be a continuing power. No such continuing power to "elect" could be granted by the legislature. Counsel attempts to argue that this power to "elect"

could be granted, and as a continuing power, because it has been decided that under the laws conferring upon railroads the right to condemn, they have a continuing right. But the nature of the right claimed by plaintiff is entirely different. The right to elect, as claimed here, would be a complete surrender of governmental power Plaintiff would be limited only by its own judgment and its own desire for acquisition. It could multiply its tracks along the whole distance from 16th street to 51st street, following simply its own convenience. The right to condemn, on the other hand, involves no surrender of legislative discretion, the course of procedure in the court affords ample safeguards both to public and private interests. There is no surrender of a trust or of discretion in dealing with trust lands.

The argument of the public authorities is not based on the possibility of abuse; it is based on the total want of power in plaintiff to do what it has attempted, on the deliberate endeavor by plaintiff to seize public trust lands without a shadow of right or authority.

In order to draw a comparison between plaintiff's claim in this case and its relation to the law of eminent domain, plaintiff or some other railroad company would have to take possession of private property for its private purposes without compensating the owner and without condemnation proceedings, then the cases might be parallel.

The question as to whether plaintiff might abuse the privilege claimed by it or whether public or private convenience is more or less affected by this particular location of this round-house, or whether the four acres attempted to be seized is more or less valuable than other portions of the lake shore, is not in issue—the question is one simply of power. An illustration of the fallacy of plain-

tiff's argument is afforded by the case of *Revell* v. *The People*, 177 Ill., reading on page 479, where the Supreme Court of Illinois decided that a riparian owner could not run out piers into Lake Michigan for the purpose of increasing his land by the resultant action of the waters and piers. The argument was advanced, there as here, that no one was harmed; that navigation was not affected; that the submerged lands were valueless. The court says:

> "The appellant here owned the premises bordering on the lake, but his title to the premises extended only to the water's edge, and the fee in and to the lands covered by the waters of the lake was vested in the state and held by the state in trust for the people. The fee being in the state, the important question presented is, whether appellant, without a grant or other authority from the state, had the right to go upon the submerged lands and erect the structures complained of. * * * We think it is clear that the act complained of in this information was a trespass upon the lands of the state. * * * But it is said in the argument that the erection of the structures complained of was not injurious to the state, and hence there was no basis for the interference of a court of equity. We do not concur in that view. Although the act complained of was not injurious and was not a public nuisance, still it was an unlawful act of such a character as would properly authorize a court of equity to interfere." * * *

So in this case, although no specific damage is done to public or private interests by this proposed filling and, although the trust land sought to be appropriated would be very useful and valuable to plaintiff, it cannot take the same because it has no "grant or other authority from the state."

But the Revell case goes still further and finds that these illegal appropriations of submerged and even worthless lands (in the commercial sense) are a damage to the

state that should be legally prevented. Reading on page 483, the court says:

> "* * * It is apparent * * * that the construction of the piers was injurious to the state. It is true, the appellant testified that the piers were constructed to prevent erosion and protect his shore bordering on the lake; but it is apparent from the evidence that the effect has been to add new land to his premises. * * * In other words, the erection of the piers has increased appellant's land and diminished the land belonging to the state. This being so, it cannot be said that the construction of the piers was not injurious to the state."

Still more is the artificial filling of this four acres for a round-house "injurious to the state," although in each case the land covered by the shallow waters was of no commercial value.

Plaintiff's counsel attempts to argue that the decision in the 146th U. S. sustains his contention; but, as we have already shown, this court in that case, in plain language, distinctly sustains the position here taken by defendant in error. In that case the court validates the encroachments of plaintiff upon the bed of the lake theretofore made, because they were made under ordinances from the city, and because, where plaintiff had merely taken possession without any ordinance, its taking of such filled ground had been ratified by the act of 1869. As we have seen, that act is not, as counsel claims, to confirm only certain rights of plaintiff *under its charter*, but performs a double service. First, to confirm all prior taking by the company of *land, under its charter*, and to ratify all prior taking of *submerged lands*, without authority.

This court in the prior case not only holds that the act of 1873 is a revocation of the illegal attempt of the legis-

lature to grant one mile of submerged lands, as admitted by counsel, but goes further, as we have seen, and holds that, without such revocation, the act of 1869 was "inoperative to affect, modify or in any respect to control the sovereignty and dominion of the state" over these submerged lands.

The very conclusion of the opinion of this court cited by counsel supports defendant's position. Because it is there directed that the court below ascertain whether the "piers" and "docks" "erected by the company, by virtue of its riparian proprietorship," extend into the lake beyond the point of practical navigability, the same to be "abated and removed" if they do.

But the only right the riparian owner has is to wharf out by piers or docks in aid of commerce and navigation, it is on this theory only that these structures between 12th and 16th streets are "piers" and "docks," that they are not ordered in that case to be at once "abated and removed." But these structures are as much needed by plaintiff in its business as the round-house here contemplated, and if it could not build anything between 12th and 16th streets but piers and docks in aid of navigation, neither can it here, at 27th street, where it is equally the riparian owner. But plaintiff makes no claim that this is a wharf or pier or dock, but openly admits it wants to fill in simply for a round-house, and *disclaims* any rights on the premises as *riparian owner*.

But the court found in the 146th U. S. that plaintiff had no right, *under its charter*, to fill in between 12th and 16th streets, where, as here, it was riparian owner, and found that it had no other right than as riparian owner to wharf out, and ordered all structures, not wharves built out properly under its rights as riparian owner, to be

abated and removed. That question is no longer open, because plaintiff's rights are identical at 27th and 16th streets.

As we have seen, the act of 1869 gave title, by ratification, to all the *land* taken under its charter by plaintiff, and to all *submerged land* held by it by virtue of occupation and prior appropriation in front of sections 10 and 15. It at the same time ratified plaintiff's title to all the *land* taken under its charter and all the *submerged land* theretofore appropriated, without authority, between 12th street and lot 21, practically 16th street (in front of section 22), because it *recognized by its terms and ratified* the occupancy and appropriation by plaintiff of the filled lands within the breakwater of 1869, down to that point.

The act in terms grants to the company all the right of the state

> "in and to the submerged lands constituting the bed of Lake Michigan and lying *east of the tracks and breakwater* * * * of the (company) * * * for the distance of one mile, and between the south line of the south pier (about Randolph street) extended eastwardly and a line extended eastward from the south line of lot twenty-one, south of and near to the round-house and machine shops of said company."

Counsel says in his argument that this round-house and these machine shops were built in 1855 and rebuilt in 1860 on reclaimed submerged lands; that plaintiff's right to construct and maintain them on such lands was adjudged in the case in the 146th U. S.; that there was no right to erect or maintain them there except under the charter of 1851; that plaintiff now seeks to exercise the same power to erect this engine house at 27th street, and that the lake front cases furnish a complete adjudi-

cation of the company's right to do under its charter at 15th street what it now seeks to do at 27th street. But counsel is wrong. The case in the 146th U. S. makes no affirmative finding as to the old filled ground on which these buildings partly stood, but does direct that an inquiry should be instituted as to the ground filled in in 1870, 1882 and 1885, and directs that all of the same as shall be found not to be wharves, properly built under plaintiff's right as riparian owner, shall be abated and removed.

In so far as plaintiff's structures on the ground already filled in 1869 are concerned, they are legalized, and plaintiff's title to that filled ground confirmed, not by any right derived from the charter of 1851 (unless, indeed, such submerged lands were filled at once under that act), but by the ratifying act of 1869. That act in terms recognizes the occupancy of plaintiff of this filled ground and these identical buildings erected thereon, and thereby ratifies the taking of such filled grounds as completely as if in technical language.

It is a complete "legislative ratification" of the appropriation by plaintiff up to that time, of all the filled ground from 12th street to the south line of block 21.

McAuley et al. v. *C., C. & I. C. Ry. Co.*, 83 Ill.,
reading on page 352.

So the question of plaintiff's right under the charter of 1851 was not necessarily before the court as to these 15th street filled grounds, and there is no adjudication in the 146th U. S. that confirms plaintiff's position.

On the contrary, as we have seen, the 146th U. S. distinctly holds that the continuing power to elect to take these trust submerged lands cannot be granted by the legislature.

It is not necessary for the court to determine in this case whether under its charter plaintiff could have legally taken any needed parcel of submerged land when it first located its road, or within a reasonable time thereafter—that issue is not before the court—but the court has in substance already virtually decided in the 146th U. S. that the continuing power to "elect" here claimed could not and cannot be, and was not, granted.

Counsel asks if the title to submerged lands taken at 27th street would not be confirmed as freely and fully as that of the 15th street lands has already been. We answer, undoubtedly yes, if such taking had been ratified by the legislature as was that at 15th street by the act of 1869.

The quotations by counsel at the end of his argument from the opinions delivered by the lower court and that of Mr. Justice FIELD here, do not help him, because in each it is distinctly said that before any part of the submerged land can be taken, the consent of the city is a necessary condition.

In the case in the 146th U. S. no part of the plaintiff's right of way or of the submerged lands, south of 15th street, were in question, but the principles there announced must decide this case, it is respectfully submitted, in favor of the defendant in error.

As we have said, the power of the plaintiff in error under its charter at the first location of its road is not in question. The continuing power claimed now, however, that plaintiff can usurp for all time the powers of the legislature to determine what parcels of this trust property shall be taken for private ends, must be denied.

Mr. Justice HARLAN, in his opinion in the lower court,

himself raises the doubt of the right of the company to this continuing power claimed.

Reading in 33 Federal Reporter, on page 758, he says:

> "Whether the railroad company * * * could lawfully erect other structures on the lake without authority from the legislature of the state, all questions which the court is not now required to determine."

In conclusion we urge that this writ of error should be dismissed, there being no federal question involved.

If, however, we are wrong upon this proposition, we believe that the decree of the Illinois Supreme Court should be affirmed, upon the merits.

If by this charter of 1851 any continuing power were granted to plaintiff in error to "elect" to take from time to time any parcels of the trust property it might need in its business, such taking could be only upon condition that the city of Chicago would first consent as to any of the submerged lands under her jurisdiction.

This consent has never been asked or obtained in this particular case.

But such a grant in plaintiff's charter would be a surrender by the legislature of governmental power, would be an abdication of a trust; to quote the language of the court, the charter of 1851 "was inoperative to affect, modify or in any respect to control the sovereignty and dominion of the state over the lands or its ownership thereof."

Respectfully submitted.

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No. 114.

Add'l Br. of Browning & Walker for D. C.

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OCTOBER TERM, A. D. 1899.

No. 114.

ILLINOIS CENTRAL RAILROAD COMPANY,
PLAINTIFF IN ERROR,

vs.

THE CITY OF CHICAGO,
DEFENDANT IN ERROR.

ERROR TO THE SUPREME COURT OF THE STATE OF ILLINOIS.

ADDITIONAL BRIEF ON BEHALF OF DEFENDANT IN ERROR.

GRANVILLE W. BROWNING,
FOR DEFENDANT IN ERROR.

CHARLES M. WALKER,
COUNSEL TO THE CORPORATION,
OF COUNSEL.

BARNARD & MILLER PRINT, CHICAGO.

IN THE

SUPREME COURT OF THE UNITED STATES,

OCTOBER TERM, A. D. 1899.

No. 114.

ILLINOIS CENTRAL RAILROAD COMPANY,
Plaintiff in Error,

vs.

THE CITY OF CHICAGO,
Defendant in Error.

ERROR TO THE SUPREME COURT OF THE STATE OF ILLINOIS.

Additional Brief on Behalf of Defendant in Error.

MAY IT PLEASE THE COURT:

Out of excess of caution, we will make some reply to the two briefs filed in answer to our argument, although we respectfully submit that nothing contained in either of such briefs meets the position virtually taken by your Honors in the case in the 146th U. S., and urged by us in our argument, that the plaintiff's charter did not grant to it a roving commission to take any submerged land under the shallow waters of Lake Michigan, from 16th street to 51st street, that it might "elect" to take as being necessary to its business.

And we again urge that there is no federal question involved, and hence plaintiff's writ of error must be dismissed.

I.

As to the question of jurisdiction, the plaintiff's writ of error should be dismissed as not involving a federal question, because the decision in the Supreme Court of Illinois, *is based wholly upon the construction of plaintiff's charter*, taking the language thereof as it stands, and considers no other question and gives effect to no legislation passed subsequent to the granting of plaintiff's charter.

In the case of *Bacon* v. *Texas*, 163 U. S., 207, cited by us in our brief, this court says, reading on page 216:

> "The contract can only be impaired within the meaning of this clause in the constitution and so as to *give this court jurisdiction* on writ of error to a state court, by some subsequent statute of the state, which has been upheld, or effect given it, by the state court."

And further:

> "If the judgment of the state court gives no effect to the subsequent law of the state, and the state court decides the case upon grounds independent of that law, a case is not made for review by this court upon any ground of the impairment of a contract."

To the same effect is the decision in the N. O. Waterworks case, 125 U. S., quoted from on page 15 of our brief, and the other cases cited therein.

The Illinois Court, 173 Ill., 471, construes the language of the grant, deciding that it does not include submerged lands under Lake Michigan, and further decides, reading on page 485, that even if the language included such submerged lands:

> "It does not follow that the railroad company would have the right at any time it might see proper to take and appropriate to itself any of the lands cov-

> ered by the waters of Lake Michigan, provided only, that the navigation of the lake is not interfered with. It is true that the state holds the title to the lands covered by the waters of Lake Michigan lying within its boundaries, but it holds the title in trust for the people, for the purposes of navigation and fishing. The state has no power to barter and sell the lands as the United States sells its public lands; but the state holds the title in trust in its sovereign capacity for the people of the entire state, as held in *People* v. *Kirk*, 162 Ill., 138,"

following with copious quotations from the decisions of this court in the 146th U. S. Nothing else is touched upon or decided in the state court, and following the uniform decisions of this court, the writ of error should be dismissed.

To the same effect, that the writ of error must be dismissed, where only the construction by the Supreme Court of the state of the grant to plaintiff is involved and there is no decision as to the effect of the statute complained of, is the case of *Central Land Company* v. *Laidley*, 159 U. S., 103.

The other point made in our brief that, even if the Supreme Court of Illinois had passed on the question as to whether the contract was impaired by reason of the city of Chicago's adoption of the Cities and Villages act of 1872 and acting thereunder, there would still be no federal question involved, is, we submit, well taken, because in the Rucker case, in which this very charter was involved, the court found what the powers of the city were over the submerged lands, in the light of the rights claimed by plaintiff under its charter.

There being no change in those powers brought about by subsequent legislation, no impairment of any of plaint-

iff's rights could result; the powers of the city, as set out, are held in the Rucker case to have existed at the time plaintiff's charter was granted, and not to have been subsequently enacted.

The Walla Walla case, we submit, is not in point, because, *firstly,* in that case the effect of subsequent legislation was passed on by the state court, and *secondly,* there was a *change in the law.*

Neither of these reasons exist in our case, and the writ should be dismissed.

Mr. Guthrie's argument on page 9 of his reply is not valid, because in the case in the 132 U. S., quoted, the grant to the railroad company was unconditional and it was held that even the re-enactment of the pre-existing law was an impairment, because the company's grant had repealed, as to itself, that law.

In the case at bar there is no such situation because the granting of plaintiff's charter did not change the city's powers a particle, plaintiff's charter being conditional, so far as any rights thereunder within any city were concerned, upon the city's consent; that consent, of course, so far as submerged lands are concerned, being exercised under the city's powers derived from its then existing charter.

It is true that before this district at 27th street was taken into the city, the city would have had no powers, and that if the road had filled in these four acres, the city would perhaps have had no interest or rights in the premises. But the railroad did not take such action, and as the city's boundaries were extended to include 27th street and ultimately 51st street (where the railroad leaves the shore of the lake) if any rights to take submerged land at

those points continued in plaintiff under section 3, the necessity of getting the city's consent before exercising such rights also continued.

When, therefore, the road should attempt to seize new territory at 27th street after annexation, if it had any powers remaining, they must be subject to the same condition of the city's consent.

But, as we have seen, these points were not passed upon by the state court, only the language of plaintiff's charter was construed.

II.

Counsel states that we take the position that plaintiff has the right to take the submerged lands provided the city's consent is obtained. On page 15 of Mr. Guthrie's brief this statement is made, but this is obviously a misinterpretation of the city's position. We take the position and believe, as set out in our brief, that this court has already settled the law in the 146 U. S. to this effect, that plaintiff's charter does not and cannot legally give it the right to elect to take at any time submerged lands under the shallow waters of Lake Michigan adjoining its right of way for its private corporate purposes. For the sake of the argument we go on further and say that even if such a continuing power to elect to take the state's trust lands were sought to be granted by the act such grant was nevertheless conditioned, whenever to be exercised within the city limits, upon the consent of the city council.

We do not concede that there was such a grant, but insist that there was, and could be, none such legally made. We simply say that if any such grant were intended, it was conditional upon the consent of the city council.

Counsel argues that this particular submerged land was outside of the city limits when plaintiff's charter was granted and that upon the passage of its charter plaintiff obtained a vested right to take at any future time that particular submerged land, and that because the city's consent was not then necessary to such taking, the fact that that part of the lake shore afterwards came within the city limits and jurisdiction would not require the city's consent when the railroad, subsequent to such annexation, should "elect" to take this particular submerged land. But even if this continuing power to "elect" could have been and was granted to plaintiff, nevertheless plaintiff's rights in this submerged four acres could not be vested until plaintiff chose to exercise its option to "elect," and if this option to elect were not taken advantage of until after the four acres were within the city limits, then the provision that the consent of the city must be obtained would apply to the four acres.

If the power to elect were continuing certainly the necessity for the city's consent would be so. For instance, if this claimed power had been legally granted and a new city should be started on the shores of Lake Michigan, outside of the city of Chicago, and plaintiff should desire to change or increase its right of way or other facilities in said new city out of submerged lands under Lake Michigan, if such submerged lands existed, it certainly would not be argued that the road could exercise such imagined power without first gaining the consent of the city council as provided in this charter.

Counsel argues that the city's consent was not necessary to the erection of plaintiff's buildings on submerged lands, but in the same breath admits that the city council's consent was obtained for the building of plaintiff's depot on the submerged lands.

It is pertinent to note that he admits that this consent, so unnecessary, was only granted upon hard conditions.

It is also pertinent to note that this depot was built on submerged lands north of the line of Randolph street and in front of lands owned by plaintiff where plaintiff owned most or all the riparian rights, and therefore this consent was not obtained as suggested in another part of counsel's brief, because the city owned the riparian rights.

The experience of lawyers and business men will not lead this court to the conclusion that plaintiff obtained the city's consent uselessly. Counsel has much to say from time to time about contemporaneous construction, and certainly if there is anything in such contention plaintiff's rights are foreclosed by its ordinances obtained in 1852, 1855 and 1856.

Counsel argues that there was no city ownership and therefore no riparian rights south of Park Row, and therefore no consent of the city was obtained, but the consent of the city was obtained for the building of the depot, and that was built where the railroad itself owned the riparian rights, north of Randolph street.

But as we have said before, the question is really a secondary one, there could not be legally granted to plaintiff the power claimed.

III.

As is well known to the court, in the early times in all of our western communities land and water and air were valueless and were parted with with a prodigality which, in many instances, has long since been seriously regretted. Communities were good natured to a degree in allowing corporations and individuals to appropriate public lands and public waters and to make immense profits out of various public utilities without compensation to the public.

In this way it may be that in the early days the Illinois Central from time to time encroached on these trust lands of the state without proper authority, but it would be destructive of public interest to hold that thereby this favored corporation should have thus acquired, as against the state and the City of Chicago, vested rights. As we have seen in our original brief, the right to take any part of these submerged lands can only be granted by legislative act clear as to quantity and locality, granting only specific parcels, as determined by this court.

> "Any attempted cession of the ownership and control of the state in and over the submerged lands in Lake Michigan * * * (by the charter of 1851) * * * was inoperative to affect, modify or in any respect to control the sovereignty and dominion of the state over the lands, or its ownership thereof." * * *

Counsel argues at length as to the value of the road to the community, and we do not seek to lessen this in any particular, but we do not find anything in counsel's reply that will change the decision of this court as we understand it, that no legislature can bind the discretion of future legislatures as to trust lands.

Counsel argues that the act of 1851 gives plaintiff the same right that an act passed this year would to occupy all submerged lands belonging to the state at Chicago, which are necessary for the corporate purposes of the road. In the first place, under the decision of this court in the 146 U. S., we do not believe that this would be a valid grant even if the act were passed to-day, because it is too general and surrenders too much the discretion of the legislature of to-day. *And yet this is the best position that could be claimed for plaintiff in any event. If it had such a charter passed by the last legislature its position would be infinitely stronger.*

The power claimed by plaintiff under the charter of 1851 is not only condemned by this court in the previous decision on pages 453-4-5 as being too great a surrender to a private corporation, but it would also be void if attempted to be granted, because as stated on page 460 of the former opinion,

> "the legislature (of 1851) could not give away, nor sell, the discretion of its successors in respect to matters, the government of which from the very nature of things, must vary with varying circumstances. * * * Every legislature must, at the time of its existence, exercise the power of the state in the execution of the trust devolved upon it."

We believe that we have already answered the argument of plaintiff as to the adjudication in the former lake front cases. We believe, as shown in our former brief, that wherever the appropriations by plaintiff of these submerged lands are upheld by this court it is either by reason of such appropriation having been made under authority, at least presumed at the time to be valid and which appropriation had long been acquiesced in, or because such appropriation was subsequently ratified by the act of 1869.

Especially in regard to the submerged lands at 16th street this ratifying act of 1869 cured the original invalidity. There was certainly no decision in the prior case that could in any way be twisted in favor of plaintiff's present contention. The fact that the question as to whether the piers and wharves about 16th street was referred back to ascertain whether they encroached upon navigation, holding that its only right was as riparian owner to wharf out to navigable water, is a complete answer to plaintiff's argument. If such alone were plaintiff's rights in the early days at 16th street, such certainly is the limit of its powers at 27th street to-day.

As we have seen, it may well be that plaintiff was considered to have the right to appropriate submerged lands under this charter immediately upon its coming into force, and it may also well be that through carelessness and good nature plaintiff was permitted to appropriate other submerged lands later, but we do not believe that it can be successfully argued, that on the one hand the power to appropriate was continuing for all time, and on the other hand, that plaintiff now enjoys a vested right, because of the carelessness and good nature of the official or citizen of early days.

If the railroad had filled in this four acres and erected its round-house prior to 1869 and that act ratified such appropriation as it did the appropriation at 16th street, then the cases would be parallel, but because such ratification was necessary in the case at 16th street, so this attempted seizure at 27th street is illegal.

The other brief filed in behalf of the plaintiff argues that because the road has the right to take a strip 200 feet wide for its right of way, therefore it must also have the right to appropriate for depots, engine-houses, etc., but we

contend that under the charter plaintiff acquired no power to "elect" to take any of these submerged lands for either right of way or for buildings, etc., as a continuing power. As we have seen in our original brief, this continuing power, even if it could be validly granted, has not been. The act must be construed against the plaintiff. Plaintiff relies on the Hamilton Gas Light Company case in the 146 U. S., on his proposition that this court has jurisdiction of this case, but aside from the fact that the case is not in point, since there the state court did pass upon the effect of the statutes complained of, it is an unfortunate citation for plaintiff, because it decides that contracts such as the one claimed to have been given to plaintiff by its charter must be most strongly construed against the person enjoying the benefit of the same. Counsel asks on page 13 of the second brief why a distinction should be made against "land" in the first part of section three and "lands" as subsequently recited in the said section. As shown in our first brief, the reason for making a distinction is that in the one case the word stands by itself, in the others it is limited by association in the one case with the word "streams" and in the other with the words "such waters." In the cases cited by counsel in plaintiff's second brief, the words "land" or "lands" are not placed in connection with the words "waters" or "streams" or other words limiting their meaning.

Counsel on page 18 discuss the decision in 146 U. S., and state that thereby the possession of the railroad to any of its lands actualiy occupied was not disturbed.

But as we have seen, this fact is because of the ratification of the previous takings contained in the act of 1869.

We respectfully submit that counsel mistakes the decision in 146 U. S. in another particular. He states

that that decision only found that the general grant contained in the act of 1869 was invalid, because revoked by the act of 1873, but as we have shown on page 460 of that opinion, this court distinctly says that without the revoking act of 1873 that part of the act of 1869 is void, as attempting to surrender power. As we have seen, the surrender of public authority and discretion claimed to have been made by this charter is much greater and more serious than he "abdication" in the act of 1869, which this court says "is not consistent with the exercise of that trust which requires the government of the state to preserve such waters for the use of the public."

It is claimed that this charter is an "abdication" of the general control of the state over the submerged lands from 16th street to 51st street.

We submit that there is no discrepancy between the decision of the state court in the Illinois Central case and the decision of that court in the Boulevard case, *The People* v. *Kirk*, 162 Ill., 138. In the latter case the park commissioners are agents of the state carrying out the public functions as such agents.

The state can utilize these submerged lands for the benefit of the public where it might not legally grant them to a railroad corporation to be used for corporate purposes. Moreover the decision of the state court in this matter is based on the prior decision of this court, and if the decision in the Kirk case is wrong that fact does not affect the decision in the case at bar.

In their second brief plaintiff's counsel rely on an imagined discrepancy between the Rucker case in the 14th Ill. and the case in the 173d Ill., the case at bar. We do not believe that any discrepancy exists, but if any there

be, the last decision undoubtedly governs. But as we have before shown, it might be held that plaintiff could take possession of submerged lands immediately upon the granting of its charter, although at the same time the grant as claimed to be continuing or perpetual might be held to be utterly void for that reason.

Counsel also lays a good deal of stress upon the act of 1869 as being a construction of the charter of 1851 favorable to their contention. But that act of 1869 has already been construed by this court as void except as ratifying certain specific acts of plaintiff, and we do not know of any legislation which more loudly calls for the principle of strict construction against the promoter, ruled by the cases cited in our first brief, than this act of 1869. As we have argued there the claimed powers in the charter of 1851 are void and are more obnoxious to public rights than the general grant of the act of 1869, already definitely condemned by this court.

In discussing the decision in the 33 Fed. Rep. and the 146 U. S., counsel do not note the explicit condemnation in both of acts attempting to surrender governmental power and the expressed doubt whether any right there may have been had not already been exhausted, and whether the right to take under the charter of 1851, if it ever existed, were continuing.

In conclusion, we believe that the decision of this Honorable Court should be rendered for the defendant in error by the dismissal of the writ of error, the Supreme Court of Illinois not having passed on anything but the construction of the charter of plaintiff. Failing this, the charter should be construed, as we believe it already has been by this court, as not giving the continuing right to

take the trust lands of the state, thus working a surrender of governmental power.

Respectfully submitted.

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